Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1997

MIDLAND EXPORT, LTD.

Petitioner

VS.

ELKEM HOLDING, INC., FERRO INVEST II, INC., and ELKEM METALS COMPANY, L.P.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the District Court's ruling affirmed by the Circuit Court of Appeals misstated the law of antitrust standing by applying the indirect purchaser rule to the plaintiff a direct competitor of the defendants in the relevant market.

II. Whether the District Court's ruling affirmed by the circuit court of appeals misstated the standard for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The caption of the case in this Court contains the names of all parties to the proceedings in with the United States Court of Appeals for the Third Circuit and in the United States District Court for the Eastern District of Pennsylvania. The Plaintiff-Appellant, Midland Export, Ltd., has no parent or subsidiary companies.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CITATION OF OFFICAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

The October 15, 1997 ruling of the Court of Appeals and the opinion of the District Court adopted thereby, whose judgment is herein sought to be reviewed, No. 96-2135 is reprinted in the separate Appendix to this petition. The opinion and order of the District Court No. 96-4056, appear in the Appendix at pp. A-19 to A-39. The opinion and order of the Third Circuit Court of Appeals appear in the Appendix at pp. A-40 to A-41. The District Court opinion is also reprinted at 947 F.Supp. 163 (E.D. Penn. 1996).

STATEMENT OF JURISDICTION

The judgment of the District Court was entered November 18, 1996. The Judgment of the Court of Appeals was entered October 15, 1997. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). Federal question jurisdiction exists in the District Court pursuant to 28 U.S.C. §1331 which provides that the federal courts shall have

jurisdiction over matters brought pursuant to the laws of the United States. This action is brought pursuant to the Sherman Antitrust Act of 1890, 15 U.S.C. §1 *et seq.* and the Clayton Antitrust Act of 1914, 15 U.S.C. §12 *et seq.* The appeal to the U.S. Court of Appeals for the Third Circuit was an appeal as of right under Rule 3 of the Federal Rules of Appellate Procedure. The District Court's decision was entered on November 19, 1996. Notice of Appeal was timely filed with the clerk of the United States District Court for the Eastern District of Pennsylvania on December 18, 1996. The appeal was from a final order of the District entered on November 18, 1996 disposing of all of the claims with respect to the parties.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

STATUTES:

15 U.S.C. §1, *et seq* (Sherman Act)

15 U.S.C. §12, *et seq* (Clayton Act)

19 U.S.C. §1671, *et seq* (Trade Act if 1930)

19 U.S.C. §1673(b)(1) (Trade Act of 1930)

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Fed.R.Civ.P. 12(b)(6)

STATEMENT OF THE CASE

The Plaintiff-Appellant, Midland Export, Ltd. ("Midland") is an importer/exporter and seller of ferroalloys, including silicon metal and ferrosilicon, and imports, markets, sells and distributes Chinese silicon metal in the United States. The Defendants-Appellees, Elkem Holding, Inc., Ferro Invest II, Inc., and Elkem Metals Company, L.P., are domestic producers, importers, exporters, marketers and distributors of ferroalloys, including silicon metal and ferrosilicon. Collectively, the Defendants-Appellees account for essentially all sales in the relevant market. The relevant market is the United States domestic market for ferroalloys, silicon metal and ferrosilicon. The Defendants-Appellees and the Plaintiff-Appellant are direct competitors in this market.

Midland instituted this action on June 19, 1996 seeking relief under the Sherman Antitrust Act of 1890, 15 U.S.C. §1 et seq. (1990 & Supp. 1996) (the "Sherman Act") and the Clayton Antitrust Act of 1914, 15 U.S.C. §12 et seq. (1990 & Supp. 1996) (the "Clayton Act"). The Plaintiff-Appellant alleges the Defendants-Appellees combined and conspired to increase the domestic market price of silicon metal so significantly that the domestic silicon metal industry would appear materially injured or threatened with material injury, thereby requiring the imposition of trade protection by the U.S. Department of Commerce extreme enough to close the U.S. market to imports of silicon metal from China. The imposition of trade protection in the U.S. market was an essential element of the Defendants-Appellees scheme to increase prices. The Defendants-Appellees combined and conspired to increase prices, create an oligopoly in the relevant market, and cause the U.S. Department of Commerce to introduce antidumping duties to restrict competition from imports and exclude competitors such as the

Plaintiff-Appellant from the relevant market. The Defendants-Appellees filed a Motion to Dismiss the Plaintiff's Complaint in its entirety for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction. The District Court granted Defendants' Motion to Dismiss on November 18, 1996, and the Third Circuit affirmed on October 15, 1997.

REASONS FOR GRANTING THE WRIT

The judgment of the United States Court of Appeals for the Third Circuit should be reviewed by this Court because it erroneously affirmed the District Court's judgment dismissing the Plaintiff's complaint solely on the basis of standing. The judgment of the District Court should be reviewed because it misstates and misapplies the existing law of "antitrust standing" and the "directness" test. Moreover, the District Court misstated the law by applying the "Indirect Purchaser" rule to a case involving only market competitors, not purchasers. Furthermore, there is a well recognized split among the circuits in the appropriate statement and application of the "standing

requirements" and the "directness" test. Finally, the District Court misstated the law relating to the application of F.R.Civ.P. 12(b)(6) and the standard for reviewing antitrust claims under Rule 12(b)(6).

ARGUMENT

I. THE DISTRICT COURT MISSTATED THE LAW OF ANTITRUST STANDING.

The District Court improperly relied on the indirect purchaser rule to conclude that Midland lacks standing because "[t]he most direct victim of the alleged price fixing . . . is . . . the purchaser who paid too much for silicon metal products as a result of the conspiracy." Appendix, p. A-33. The Plaintiff-Appellant, however, has the requisite standing to maintain this action as a direct competitor of the Defendants-Appellees.

A. THE SHERMAN ACT.

Section 1 of the Sherman Act prohibits "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations . . . ." Section 2 of the Sherman Act provides,

in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . ."

Under Section 2, there must be a specific object to "monopolize, or attempt to monopolize." This differs from Section 1 which requires a conspiracy but does not require monopolizing or attempting to monopolize.

An action under Section 2 alleging an attempt to monopolize and actual monopolization necessarily involves intentional predatory or anticompetitive conduct. Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1057-58 (9th Cir.1983). In this case, the charge is that the Defendants-Appellees conspired to enable themselves and certain conspiring entities to create an oligopolistic market and cause the U.S. International Trade Commission on the basis of that oligopolistic market to impose severe duties on imports.

B. A COMPETITOR HAS STANDING TO SUE

UNDER THE SHERMAN AND CLAYTON ACTS.

Standing in antitrust actions is governed by Section 4 of the Clayton Act, 15 U.S.C. § 15 (1991). To have standing, the Plaintiff must prove that it suffered antitrust injury, that is, "injury of the type the antitrust laws were intended to prevent." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S.Ct. 690, 697-98, 50 L.Ed.2d 701 (1977). A mere causal connection between the alleged antitrust injury and the Plaintiff's alleged harm is insufficient. McDonald v. Johnson & Johnson, 722 F.2d 1370, 1374 (8th Cir. 1983), cert. denied, 469 U.S. 870, 105 S.Ct. 219, 83 L.Ed.2d 149 (1984). Standing requires an evaluation of "the plaintiffs' harm, the alleged wrongdoing by the defendants, and the relationship between them." Associated Gen. Contractors v. Council of Carpenters, 459 U.S. 519, 535, 103 S.Ct. 897, 907, 74 L.Ed.2d 723 (1983). However, such an analysis demands more than a cursory review of the complaint. Further, when the review is based upon a Rule 12 (b)(6) motion, the mere possibility of a valid claim requires

the court to permit the action to proceed. Bowers v. Hartwick, 478 U.S. 186 (1986); see also, Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957) ("a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

Antitrust laws were designed to protect competition. Consequently, standing is generally limited to actual market participants, that is, competitors or consumers. Associated Gen., 459 U.S. at 539, 103 S.Ct. at 909; South Dakota v. Kansas City S. Indus., Inc. 880 F.2d 40, 47 (8th Cir. 1989), cert. denied, 493 U.S. 1023, 110 S.Ct. 726, 107 L.Ed.2d 745 (1990). It is undisputed that Midland was and is a market participant and competitor of the Defendants.

The District Court's ruling was based primarily upon directness of the claimed injury, and stated the test for standing as follows:

> (1) the causal connection between the antitrust violation and the harm to the plaintiff (including

> whether the defendant intended to cause that harm); (2) whether the 'nature' of the plaintiff's alleged injury is 'of the type that the antitrust laws were intended to forestall'; (3) the directness or indirectness of the asserted injury; (4) the existence of more direct victims of the alleged injury (i.e. whether the plaintiff is the party most likely to seek redress of the antitrust violation); and (5) the potential for duplicative recovery or complex apportion damages.

However, the District Court's decision completely ignores the Plaintiff's status as a competitor in the relevant market who suffered a direct injury as a result of the alleged conspiracy to fix prices and exclude competition. These allegations more than satisfy the standing requirement enunciated in Associated Gen., supra.

The Third Circuit's view of "directness" diverges from that of the Seventh Circuit. The Seventh Circuit's test for directness conforms closely to the analysis in Associated Gen., supra, which encompasses all of the damages naturally flowing from the alleged anticompetitive acts. Sanner v. Board of Trade, 62 F.3d 918 (7th Cir. 1995). The application of the Seventh Circuits analysis in Sanner to the facts in this case

compels a different conclusion.

In Sanner, certain soybean farmers sued the Chicago Board of Trade alleging they were injured by an emergency resolution of the Board ordering holders of "long" positions in soybean futures to liquidate their positions. The Board's resolution allegedly caused a price decline in the soybean futures market, which caused a corresponding decline in the soybean cash market. The plaintiff farmers were sellers in the soybean cash market, not trading in soybean futures, who alleged that the emergency resolution harmed them because it depressed prices in the soybean cash market. The plaintiffs also claimed that the Board's resolution was an illegal restraint of trade which caused them to suffer losses in the soybean cash market. The defendant unsuccessfully argued that the injuries suffered by the plaintiffs were "indirect" and derivative in nature -- the exact argument made in this case and accepted by the District Court.

The Seventh Circuit ultimately concluded that because the farmers were sellers in the cash market who claimed injury

caused by an unlawful action in the closely related futures market, the plaintiffs had antitrust standing. Id. at 927. The court concluded that the injury alleged was sufficiently direct to form a basis for antitrust standing. The court rejected the contention that the price depression in the soybean cash market was an "indirect" result and "derivative" of the price decline in the soybean futures market because it rejected the view that there was a "disjunction . . . between the cash market and the futures market for soybeans." Id. at 928. Acknowledging differences between the two markets, the Seventh Circuit concluded that the two markets were not "unrelated for the purposes of antitrust standing analysis" since a significant price change in the futures market generally correlated with a similar price change in the cash market. Id. at 929. This close relationship between the two markets offered a basis for antitrust standing: "Since [the cash market] tends to move in lockstep with [the futures market], participants in the cash market can be injured by anticompetitive acts committed in the

futures market." Id.

In this case, the Defendants-Appellees, acting through their agents, servants and employees, met with other U.S. producers of silicon metal at various places including Buffalo, New York, Pittsburgh, and Washington, D.C. Together, they combined and conspired to fix the price of all silicon metal produced and sold in the United States. They also agreed to artificially increase the price of silicon metal to increase profits in the then highly competitive silicon metal market. The Defendants-Appellees and their co-conspirators also conspired and agreed that based upon the artificially high prices for silicon metal caused by their conspiracy to fix prices at an artificially high level, it would be beneficial to petition the International Trade Administration ("ITA") and the International Trade Commission ("ITC") to impose severe dumping duties on imports of Chinese silicon metal in order to prevent imports from gaining an even larger share of the United States silicon metal market. Without resorting to the ITC and the ITA, the

entire scheme would fail. Obviously, without protection from imports, the Defendants' market share would decline. The strategy agreed upon by the Defendants-Appellees would, in fact, use the artificially high prices established for domestic silicon metal to affect the ITC and ITA's determination of "material injury," meaning that the risk from lower priced imports would appear even more significant if prices were artificially higher.

The Defendants-Appellees' conduct was improper, unlawful, and unfair, in that at the time the Defendants-Appellees participated and assisted in the filing of the dumping proceeding, and at the time they conspired to fix prices and use the dumping proceeding to prevent foreign competition, they knew or reasonably should have known their conduct would cause the imposition of dumping duties. The Defendants-Appellees and their conspirators provided to the ITC and ITA distorted industry information, which information they knew would be relied upon by the ITA and ITC in rendering a

decision.

The District Court concluded that Midland suffered actual economic loss, but found that even though the action taken by the ITC and the ITA (the "Commerce Department") to impose a tariff on silicon metal imported from China was the result of distorted market information, the Commerce Department's action was the more direct cause of the Plaintiff-Appellant's injuries. This ruling disregards the economic reality of dumping proceedings and the fact that, but for the activities of the Defendants-Appellees, dumping duties would not have been imposed on imports from China. The decision of the ITA and ITC which forced the Plaintiff-Appellant out of the silicon metal market was the direct result of the Defendants-Appellees' illegal price fixing and market distorting activities. Consequently, the proximate cause of the Plaintiff-Appellant's damages is the Defendants-Appellees' conduct in fixing prices in the silicon market, knowing to reasonable certainty that the result of their price fixing activities would be upon their petition

the imposition of substantial dumping duties. The imposition of antidumping duties was neither a supervening nor an intervening cause, but was a reasonably anticipated and foreseen consequence of the Defendants-Appellees' activities. In fact, the Defendants-Appellees and their co-conspirators discussed this anticipated result when they discussed the price fixing scheme as a whole.

Courts' consideration of antitrust standing "should reflect the anti-competitive effect either of the violation or of anti-competitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations...would be likely to cause.' " Alberta Gas Chemicals v. E.I. DuPont de Nemours, 826 F.2d 1235, 1240 (3d Cir. 1987). In this case, the harm suffered by the Plaintiff-Appellant reflects the "anti-competitive effect" of Defendants-Appellees' actions. That the Defendants-Appellees contemplated the effect of antidumping duties at the very time they met with their co-conspirators to discuss price fixing and that the co-conspirators and the

Defendants-Appellees acted jointly in filing the dumping action makes even more apparent this causal connection.

Furthermore, the nature of the asserted injury is "of the type that antitrust laws were intended to forestall." In Re Lower Lake Erie Iron Ore Antitrust Litigation, 998 F.2d 1144, 1165 (3d Cir. 1993). The Defendants-Appellees' conspiracy restrained the economic freedom of the Plaintiff-Appellant in the silicon metal market. Consequently, the resultant antidumping duties on imports from China are of the "type of loss that the claimed violations...would be likely to cause." Brunswick Corp., 429 U.S. at, 489. The court disregards economic and factual reality in concluding that it "cannot say that market distortion resulting from price fixing would likely result in the wrongful imposition of antidumping duties by the ITC given the ITC's expertise and independent decision-making process". Appendix, p. A-32. The District Court also considered "the existence of more direct victims of the alleged injury." Iron Ore, 998 F.2d at 1165. The District Court determined that the harm which is

likely to be caused by a price fixing conspiracy is inflated prices. As a result, it found that the Plaintiff-Appellant, a competitor, is not the most direct victim. In making this determination the District Court relies on the "direct purchaser" rule outlined in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977) and McCarthy v. Recordex Serv., Inc., 80 F.3d 842 (3d Cir. 1996), which bars "downstream indirect purchasers from bringing an antitrust claim against an alleged monopolist." Appendix, p. A-33. This conclusion flies in the face of Associated Gen., supra, holding that competitors and consumers injured by anti-competitive activities generally have standing to raise antitrust claims.

The Plaintiff-Appellant and Defendants-Appellees are direct competitors in the silicon industry. Midland is an importer, exporter and seller of silicon metals in the United States. The Defendants-Appellees are producers of silicon metal in the domestic market. The District Court found that the most direct victim of price fixing would be the purchaser who paid too much for the silicon metal products as a result of the

conspiracy. None of the cases relied upon by the Defendants-Appellees nor the District Court require that a competitor be the most direct victim of the conspiracy. The Court in McCarthy outlined the reasoning behind the "direct purchaser rule" as follows:

> "...allowing an indirect purchaser to assert an antitrust claim for the portion of an overcharge 'passed on' to the indirect purchaser would create an intractable problem of tracing and apportioning damages between different purchasers in the chain of distribution, the Court chose to avoid this morass by enunciating a bright-line rule that only the purchaser immediately downstream from the alleged monopolist may bring an antitrust action."

McCarthy, 80 F.3d at 848.

The Indirect Purchaser rule is simply inapplicable in this case, and the District Court misstates the applicable law by relying on it. Under Associated Gen., supra, the competitor is a "market participant" and has standing to pursue federal antitrust claims.

C. THE CIRCUITS ARE SPLIT REGARDING THE LAW OF STANDING IN ANTITRUST CASES.

The various tests used to analyze standing by the different United States Courts of Appeal may be divided largely into four categories. Some Courts of Appeal have focus on the directness of the alleged injury. Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 964, n. 12 (1983). Other Courts of Appeal focus on the foreseeability of the alleged injury. Id. Other Circuit Courts first consider whether the alleged injury is potentially within the "zone of interest" the antitrust laws were designed to protect. Id. Finally, other Circuit Courts consider whether the injured party was within the "target area" of the alleged anticompetitive act. Id. Adding to the confusion is the divergence inside circuits themselves. For example, the Second Circuit adopted the "directness of injury" approach in Productive Inventions, Inc. v. Trico Prods. Co., 224 F.2d 678 (2d Cir. 1955) and the "target area" approach in Calderone Enter. Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971). Merican, Inc. 713 F.2d at 964, n.12. The Sixth Circuit utilized the "directness of injury" approach in

Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 308 F.2d 383 (6th Cir. 1962) and the "zone of interest" approach in Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975). Merican, Inc. 713 F.2d at 964, n.12.

Thus, the Seventh Circuit's analysis is completely divergent from the Third Circuit's narrow approach to directness. The effect in this case is the validation of the Defendants' anticompetitive acts.

II. THE DISTRICT COURT MISSTATED THE STANDARD FOR DISMISSAL UNDER RULE 12 (b)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

In determining whether a complaint should be dismissed for failure to state a claim upon which relief can be granted, the court must consider only those facts alleged in the complaint and accept all of the allegations as true. Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984). Unless the plaintiff can prove no set of facts in support of the claim that would entitle him to relief, the complaint should not be dismissed. Conley, 355 U.S. at 45-46,

78 S.Ct. at 102, 2 L. Ed. 2d 80 (1957); D.P. Enter., Inc. v. Bucks County Community College, 725 F.2d 943, 644 (3d Cir. 1984).

In addition, "there is no jurisdiction for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts which could be proved in support of the claim. No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it." Continental Colliers, Inc. v. Slobe, 130 F.2d 631, 635 (1942).

To avoid dismissal, Plaintiff-Appellant needs to establish that it is merely "possible" that Plaintiff-Appellant will establish that the injury alleged in its complaint was directly caused by the Defendants-Appellees' anticompetitive behavior. Iron Ore, 998 F.2d at 1167. This conclusion is essentially factual and should not be made without resort to evidence. If the pleadings are such that evidence could be offered to support the claim, the

complaint should not be dismissed. See also Merican, Inc., 713 F.2d at 964-65; Massachusetts School of Law at Andover, Inc. v. American Bar Assoc., 107 F.3d 1026 (3d Cir. 1997); Alberta Gas Chemicals, 826 F.2d at 1240, cert. denied, 486 U.S. 1059 (1988); Link v. Mercedes-Benz of North America, Inc., 788 F.2d 918 (3d Cir. 1986). The District Court erred by concluding that the directness and causation factors "cut heavily against Midland given the attenuated causal connection between the anticompetitive practices alleged and the harm that ultimately befell Midland." (emphasis added) The District Court's conclusion implies a weighing of causative factors and various allegations which would ordinarily require evidence. Moreover, the District Court's result is entirely divergent from the Seventh Circuit's analysis of a similar fact pattern Sanner, supra. Ultimately the issue the District Court resolved was whether dumping duties or the anti-competitive acts of the Defendants caused the Plaintiff injuries, and this conclusion is entirely factual.

The District Court, by reaching this apparent factual conclusion, misapplied Rule 12(b)(6) of the Federal Rules of Civil Procedure. It is well accepted that the District Court under Rule 12(b)(6) must presume as true all well pleaded allegations and that all doubts and inferences must be resolved in the pleader's favor. The pleading must be viewed in the light most favorable to the pleader. Albright v. Oliver, 510 U.S. 266, 269, 114 S.Ct. 807, 810, 127 L.E.2d 114 (1994), Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1979), Markowitz v. Northeast Land Co., 906 F.2d 100 (3d Cir. 1990). Moreover, the District Court must go beyond the pleadings themselves and determine whether the pleader could be entitled to any relief under any possible legal theory. In line with the normally liberal notice pleading requirements of the federal courts, a complaint should not be dismissed under Rule 12(b)(6), even though the legal theories are not cognizable, so long as other asserted legal claims are evident on the face of the complaint, which support a claim. Conley, 355 U.S. at 45-46,

78 S.Ct. at 101-102, 2 L.Ed.2d. 80 (1957). The complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief. Barrett v. Tallon, 30 F.3d 1296, 1299 (10th Cir. 1994); Mid America Title Co. v. Kirk, 991 F.2d 417, 421 (7th Cir. 1993). The District Court did not apply the appropriate test, concluding that success was "unlikely" rather than impossible.

What is clearly apparent from the District Court's decision is that the court concluded that "Midland suffered economic loss because the ITC imposed a tariff on silicon metal imported from China after its independent determination that this measure was necessary to prevent further material injury to the domestic market." This conclusion required the District Court to make the following factual determinations: (1) that Midland's actual economic loss occurred because of dumping duties rather than due to the anti-competitive acts of the Defendants; (2) that the ITC's review was independent and (3)

that the harm suffered by Midland was due to tariffs rather than the direct effect of the closing of the market and the establishment of an oligopoly in the silicon market.

A Rule 12(b)(6) motion which derails the plaintiff's case pre-pleading and allows the defendant to defeat a cause of action on a claim of a conspiracy before the plaintiff has any opportunity to seek an admission that a conspiracy existed and to demonstrate the injuries it caused, improperly denies the Plaintiff a fair hearing. It is unlikely that permitting the plaintiff to proceed with its action will significantly increase the costs of litigation. The purposes of the Sherman Act and the Clayton Act will be served if the District Court grants to the plaintiff enough time to engage in a limited program of discovery with a view to permitting the plaintiff a fair opportunity to establish its injuries and prove its cause of action. The court could then consider in fairly short order a motion for summary judgment. What is important is that the plaintiff be given some chance to demonstrate the true merits of its case.

A motion for summary judgment, of course, is different in critical respects from a Rule 12(b)(6) motion to dismiss for failure to state a claim. In addition to the fact that a plaintiff presumably has had an opportunity to obtain admissions and information during discovery, a motion for summary judgment is reviewed under a much more stringent standard than a motion to dismiss for failure to state a claim. Thus, where the papers filed as part of the summary judgment motion show that there is no issue of material fact concerning the existence of a conspiracy and antitrust injuries, the contention that a trial should go forward because there might be a possibility of proving the case at trial would be merely speculative and as such insufficient to avoid summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202 (1986). A complaint should not be dismissed simply because a plaintiff is unlikely to succeed on the merits. Id. Rule 12(b)(6) dismissals are especially disfavored in cases where the complaint sets forth a novel legal theory that can best be

assessed after factual development. Wright & Miller, 5A Federal Practice and Procedure: Civil 2d § 1357 at 341-43 (1990 & 1994 pocket part).

The District Court describes the applicable Rule 12(b)(6) standard as follows:

> 1. Standard for Motion to Dismiss
>
> In consideration this Rule 12(b)(6) motion, we primarily consider the allegations contained in the complaint, although we may also take into account matters of public record, orders, items appearing in the record of the case and exhibits attached to the complaint. Pension Benefit Guar.Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993), cert. denied, 510 U.S. 1042 (1994). We must accept as true all of the allegations in the pleadings and must give Midland the benefit of every favorable inference that can be drawn from those allegations. Schrob v. Catterson, 948 F.2d 1402, 1405 (3d Cir. 1991); Markowitz v. Northeast Lane Co., 906 F.2d 100, 103 (3d Cir. 1990). We may properly dismiss the complaint only if it appears certain that Midland cannot prove any set of facts in support of its claim which would entitle it to relief. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

The court then stated that rule in context of the antitrust standing issue as follows:

> The Supreme Court has declined to fashion a

black-letter rule for determining standing in every case, holding instead that the "infinite variety of claims" must be analyzed on a case-by-case basis in light of several factors. Associated General Contractors, 459 U.S. at 536-38; see also Blue Shield of Virginia v. McCready, 457 U.S. 465, 476-478 (1982). The Third Circuit has summarized the factors to be considered "in determining if the plaintiff has suffered an injury which bears a causal relation to an alleged antitrust violation," Iron Ore, 998 F.2d at 1165, as follows:

> (1) the causal connection between the antitrust violation and the harm to the plaintiff (including whether the defendant intended to cause that harm); (2) whether the 'nature' of the plaintiff 's alleged injury is 'of the type that the antitrust laws were intended to forestall,'; (3) the directness or indirectness of the asserted injury; (4) the existence of more direct victims of the alleged injury (i.e. whether the plaintiff is the party most likely to seek redress of the antitrust violation); and (5) the potential for duplicative recovery or complex apportionment of damages.

McCarthy v. Recordex Service, Inc., 80 F.3d 842, 850 (3d Cir. 1996), cert. denied, 117 S.Ct. 86 (1996) (internal citations to Associated General Contractors omitted). These factors must be weighed and balanced," and though the Court has assigned no specific weight to the factors, "individually, collectively or relatively," the Third Circuit has described the directness factor as "all-important." Iron Ore, 998 F.2d at 1166-68.

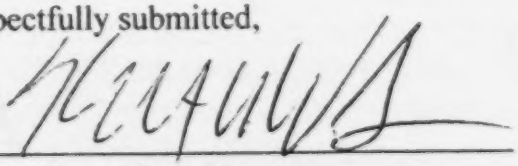
The determinations made by the District Court on the

Rule 12(b)(6) review were essentially factual in nature. They involved a determination of "causation" an inherently factual concept. Moreover, the weighing of the factors stated by the Third Circuit to consolidate the test for antitrust standing is inherently qualitative in nature. The fact that the District Court was required to weigh factors at all indicates that a mere possibility of a claim could exist depending on how the various factors are weighed.

CONCLUSION

The Plaintiff-Appellant respectfully requests that the Supreme Court grant certiorari and hear the Plaintiff-Appellant's appeal from the judgment of the United States Circuit Court for the Third Circuit.

Respectfully submitted,

By: 

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1997

MIDLAND EXPORT, LTD.
Petitioner

VS.

ELKEM HOLDING, INC., FERRO INVEST II, INC., and ELKEM METALS COMPANY, L.P.

Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

PETITIONER'S COUNSEL OF RECORD:

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Telephone No. (203) 498-0065

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

MIDLAND EXPORT, LTD. :

VS. : CIVIL ACTION NO.

ELKEM HOLDING, INC.,
FERRO INVEST II, INC.,
and ELKEM METALS
COMPANY, L.P. : JUNE 19, 1996

COMPLAINT

FIRST COUNT (TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCIES):

1. The Plaintiff, Midland Export, Ltd., is a corporation duly authorized and existing under the laws of Pennsylvania, having its principal place of business in the State of Pennsylvania.

2. The Defendant, Elkem Holding, Inc., a/k/a Elkem, Inc. (hereinafter "Elkem Holding, Inc.") is a Pennsylvania corporation not authorized to do business in New York and, in fact, doing business in the State of New York, and

having its principal place of business in Pennsylvania.

3. The Defendant, Elkem Metals Company, L.P. is a New York Limited Partnership consisting of the following limited partners: Elkem Management, Inc., a Pennsylvania corporation and Jebsens Metals, Inc., a Delaware corporation having a principal place of business in New York.

4. The Defendant, Ferro Invest II, Inc. is the sole general partner of the Defendant Elkem Metals Company, L.P. and is a Delaware corporation not authorized to do business in New York, but actually conducting business in New York.

5. This action arises *inter alia* under the Act of Congress of October 15, 1914, 38 Stat. 731 , 15 U.S.C. §§15 and 26 (the Clayton Act) to recover treble damages for the injuries sustained by plaintiffs resulting from the violations of the Act of Congress July 2, 1890, 26 Stat. 209, 15 U.S.C. §§1 and 2 (the "Sherman Act").

6. The Plaintiff is an importer/exporter and seller of ferroalloys including silicon metal and ferrosilicon in the United

States, is a direct competitor of the Defendant, Elkem Holding, Inc.

7. The Defendants together are domestic producers, importers, exporters, marketers and distributors of ferroalloys including silicon metal and ferrosilicon and are in direct competition with the Plaintiff.

8. From 1989 to present the Plaintiff, Midland Export, Ltd., engaged in the regular importation, exportation and sale of silicon metal and other ferroalloys to purchasers and consumers throughout the United States. Said purchasers are largely, producers and consumers within the domestic aluminum Industry.

9. Throughout the years 1989 to 1995 the Defendants engaged in a series of actions, agreements, conspiracies and other acts which violate various United States, New York, Ohio, West Virginia and Pennsylvania unfair competition and anti-trust laws, including but not limited to conspiracies to fix the price of the commodity silicon metal for

the periods commencing in the forth quarter of 1989 through the end of the second quarter of 1992. Said conspiracy occurred between the Defendants and others known and unknown to the Plaintiff.

10. During the years 1989 to 1992 the Defendants, in conjunction with six (6) additional petitioners and with the remaining Defendants herein, filed with the United States International Trade Commission (the "ITC") and the International Trade Administration of the United States Department of Commerce ("ITA") a petition commonly known as an Anti-Dumping Proceeding under §§731 *et seq.* of the United States Tariff Act of 1930, 19 U.S.C. §1671 *et seq.* (the "Dumping Proceeding")

11. Said Dumping Proceeding requested that the ITC impose certain anti-dumping duties (tariffs) on all imported silicon metal products imported by the Plaintiff, Midland Exports, Inc., and others from China.

12. The Plaintiff, Midland Exports, Inc., is a

marketer, importer, seller and distributor of Chinese silicon metal in the United States.

13. In filing its petition with the ITC and the ITA, the Defendants provided certain statistical, market and economic information regarding the United States silicon metal market and the domestic industry and effect of the price of imported silicon metal on the condition of the domestic industry, which information was accepted by the ITC and relied upon to render a decision imposing substantial anti-dumping duties on silicon metal products imported from China *inter alia* by the plaintiff Midland Exports, Inc.

14. The ITC and the ITA also received from U.S. producers, sellers, distributors and marketers of a variety of silicon metal, including the Defendant, lost sales information prior to concluding the investigations which resulted in the imposition of tariffs on imported silicon metal of more than one hundred (100%) percent.

15. On and prior to the date of the filing of the

Dumping Proceeding by the Defendants, the Plaintiff commenced and continued several significant business relationships with third party purchasers and consumers of silicon metal products which contemplated the sale of large amounts of silicon metal and ferroalloys imported from China, whereby the Plaintiff had a reasonable expectation of economic gain.

16. At all times relevant to this action, the third party purchasers and consumers referred to above were independent legal entities not affiliated in any way with either Plaintiff or Defendant or any related entities.

17. On and prior to the time Plaintiff was negotiating and entering into contracts for the delivery of silicon metal with the third parties, in connection with the business relationship described in Paragraphs 14 and 15, Defendant began the above illegal and irresponsible course of conduct consisting of conspiracies to fix prices and to negligently, recklessly and/or intentionally report distorted and inaccurate information to the

ITA and ITC, which was intended to and actually did disrupt or cause the disruption of Plaintiff's relationships with its consumers and purchasers, and which in fact did disrupt that relationship.

18. In engaging in the conduct described above, Defendant intended to or reasonably should have known that its actions would impair or destroy Plaintiff's business relationship with third party domestic purchasers, thereby destroying Plaintiff's expectancy of economic gain. Defendants engaged in the interfering conduct with malice toward Plaintiff and a desire to injure Plaintiff economically, and with wantonness and disregard of Plaintiff's rights. Defendant's conduct was improper, unlawful, and unfair, in that at the time it proceeded to file the Dumping Proceeding, it knew or reasonably should have known that it was engaged in anti-competitive acts and that the relevant information provided to the ITC and the ITA was inaccurate, distorted, false and misleading or negligently inaccurate, which information would be relied upon by the ITC

and ITA in rendering a decision.

19. The conduct engaged in by Defendant was the proximate cause of the loss or impairment of Plaintiff's business relationships with the third party purchasers and consumers, which resulted in the Plaintiff's loss of the expectancy of economic gain.

20. As a result of the impairment or loss of Plaintiff's business relationships with the third parties, Plaintiff suffered a loss of the economic expectancy arising from the relationships, including damages in the form of loss of sales.

21. Defendant was not justified or privileged to engage in the conduct described above, which resulted in the impairment or loss of Plaintiff's business relationships with third party purchasers and consumers.

SECOND COUNT (SHERMAN ACT - PRICE FIXING):

1. This count is instituted pursuant to the Act of Congress of October 15, 1914, 38 Stat 731; 15 U.S.C. §§15 and 26 (the Clayton Act) to recover treble damages for the injuries

sustained by plaintiffs resulting from the Defendant's violations of the Act of Congress of July 2, 1890, 26 Stat 209; 15 U.S.C. §§1 and 2 (the Sherman Act).

2-7. Paragraphs 1 through 6 of the First Count are hereby made Paragraphs 2 through 7 of this the Second Count.

8. The largest enterprises engaged in the sale, production, importation and exportation of ferroalloys, including silicon metals, through interstate commerce in and throughout the United States are the Defendants and their affiliated corporations. The Defendants are the largest enterprises engaged in the sale, production, importation and exportation of ferroalloys, including silicon metals, through interstate commerce in and throughout the United States, whether size is measured by volume of sales or corporate assets.

9. The Defendants are, and have been at all times relevant hereto, major enterprises engaged in the sale and distribution of ferroalloys including silicon metal products within the United States and sell and have sold for some time the vast

majority of all ferroalloy products distributed and sold in the United States. The market percentages held by the Defendant entities and the companies with whom they conspired to fix prices has varied somewhat from year to year, but they have consistently sold essentially all of said products sold in the United States. The market share of the United States domestic ferroalloy, including silicon metal, market held by Defendants and certain other companies with which they have conspired are at the present time essentially the entire market.

10. There had been at all times prior to the actions complained of herein vigorous competition between the Plaintiff, the Defendants, and other domestic producers of silicon metal products. This competition has existed with respect to selling and quality, advertising, selling price and with respect to the effort to establish and maintain markets.

11. Plaintiff seeks to encourage competition between Defendants, on the one hand, and Plaintiff and other domestic sellers, on the other hand, as to price, service and other aspects

of the business.

12. The Defendants and their officers, directors, members and partners, at various meetings held in Buffalo, New York and Pittsburgh, Pennsylvania during 1991 and 1992, agreed, combined and conspired to adopt as their primary objective the effort to persuade, compel or coerce the other sellers in the United States to fix prices of silicon metal products at unusually high prices. This agreement, combination and conspiracy included plans or later included plans to later restrict competition from imports by filing the Dumping Proceeding with the ITC and the ITA using market information distorted by them.

13. It has been publicly reported in the trade press, and Plaintiff alleges, upon information and belief, that after investigation of such alleged activity on the part of the Justice Department, the Defendant has pled guilty to violations of federal criminal anti-trust law. Such agreement would be a limitation upon and a restraint of competition and trade in the

sale of ferroalloys, including silicon metals, in the United States and would constitute a violation of the antitrust laws of the United States.

14. Unless restrained by legal action, the Defendant, its officers, directors and members will continue to conspire to fix prices, restrict access to the market by foreign producers by distorting industry performance figures, limit competitive pricing policies, to make public statements inaccurately and unfairly disparaging the Plaintiff and its products and its competitive activities, and will engage in other activities constituting part of said combination and conspiracy to limit and restrain interstate trade and competition in the distribution and sale of ferroalloys, including silicon metal, in the United States.

15. The continuance of such activities and course of conduct will cause and has caused irreparable and immeasurable injury and damage to the business and property of Plaintiff by diminishing Plaintiff's goodwill and reputation among its dealers, customers, consumers and third party contractors.

16. The Defendants, their officers, directors, members, partners and others, have agreed, combined and conspired among and between themselves and with others who are not known to Plaintiff to do all the things described above and referred to herein for the purposes and with the effects described and set forth herein.

17. The agreements and acts of Defendant, its officers, directors, members and others, unless restrained herein, will continue to be a contract, combination and conspiracy in restraint of trade and commerce among and between the several states of the United States, in violation of the antitrust laws of the United States as contained in 15 U.S.C. §1 *et seq.*

THIRD COUNT (SHERMAN ACT - MONOPOLY):

1-17. Paragraphs 1 through 17 of the Second Count are hereby made Paragraphs 1 through 17 of this the Third Count.

18. Defendants, their officers, directors, members, partners and others who are acting for, in conspiracy with or on

behalf of such parties, through the acts, agreements and conduct described herein, have attempted to monopolize, on behalf of the Defendants and others, the sale of ferroalloy products, including silicon metal, by recovering for said parties the market penetration which had existed prior to the Defendants' actions from the Plaintiff and its highly competitive silicon metal products; and have combined and conspired with each other and others to monopolize trade in the silicon metal market, all of which is in violation of Section 2 of the Sherman Act, 15 U.S.C. §2.

FOURTH COUNT (ABUSE OF PROCESS):

1-18. The Plaintiffs reallege and incorporate herein by reference each and every allegation contained in Paragraphs 1 through 18 of the Third Count.

19. The acts of Defendant, its officers, directors, members and others in filing, instigating and supporting the Dumping Action before the ITA and the ITC, and in filing and prosecuting said action are and constitute an abuse of legal

process, as such action was taken without probable cause and for purposes other than simply to obtain imposition of reasonable duties.

FIFTH COUNT (NEW YORK ANTI-MONOPOLY LAW VIOLATIONS):

1-16. Paragraphs 1 through 16 of the Second Count are hereby made Paragraphs 1 through 16 of this the Fifth Count.

17. The various actions of the Defendant have violated G.B.C. §340 et seq. (the New York Anti-Monopoly law).

SIXTH COUNT: PENNSYLVANIA ANTI-TRUST VIOLATIONS

1-16. Paragraphs 1 through 16 of the Second Count are hereby made Paragraphs 1 through 16 of this the Sixth Count.

17. The various actions of the Defendant are illegal pursuant to the common law.

WHEREFORE, Plaintiff respectfully prays judgment against Defendant and requests that the Court grant relief as follows:

1. Compensatory damages for the value of the business opportunity or expectancy that was lost as a result of the Defendant's tortious and improper interference and anti-trust law violation, the amount of which is $1,000,000.00.

2. Punitive damages in the amount of $2,000,000.00.

3. Any other relief to which Plaintiff may be properly and justly entitled.

4. Costs.

5. Attorney fees.

6. Equitable relief including an injunction.

THE PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY.

THE PLAINTIFF
MIDLAND EXPORT, LTD.

By /s/
Peter J. Mooney
WHITE AND WILLIAMS
1800 One Liberty Place
Philadelphia, PA 19103-7395
(215) 864-7165

Please enter the appearance of:
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Kenneth A. Votre
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105 Court Street, Suite 302
New Haven, CT 06511
(203) 498-0065
OF COUNSEL

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF PENNSYLVANIA

MIDLAND EXPORT, LTD.	:	
VS.	:	CIVIL ACTION NO.
ELKEM HOLDING, INC., FERRO INVEST II, INC., and ELKEM METALS COMPANY, L.P.	:	JUNE 19, 1996

AMOUNT IN DEMAND

The amount, legal interest or property in demand, exclusive of interest and costs, is greater than Fifteen Thousand Dollars ($15,000.00).

_____

Peter J. Mooney
Commissioner of the Superior Court

MIDLAND EXPORT, LTD.,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. **96-4056**
	:	
VS.	:	
	:	
ELKEM HOLDING, INC., FERRO INVEST II, INC., and ELKEM METALS COMPANY, L.P.,	:	FILED NOV 18, 1996
	:	
Defendants.	:	

MEMORANDUM

JOYNER, J. **NOVEMBER 18, 1996**

Plaintiff Midland Export, Ltd. ("Midland") instituted this action under the Clayton Antitrust Act of 1914, 15 U.S.C. §12 et seq. (1990 & Supp. 1996), seeking treble damages and injunctive relief for two alleged violations of the Sherman Antitrust Act of 1890, 15 U.S.C. § 1 et seq. (1990 & Supp 1996). Midland also asserts several pendent state law claims. Before the Court is Defendants' Motion to Dismiss Plaintiff's Complaint in its entirety for failure to state a claim and for lack of subject matter jurisdiction. Because Midland lacks the standing necessary to assert its federal antitrust claims, the

motion is granted.

BACKGROUND

Plaintiff Midland and Defendant Elkem Holding, Inc. ("Elkem Holding") are both Pennsylvania corporations. Defendant Elkem Metals Company, L.P. ("Elkem Metals") is a New York limited partnership with one general partner, Defendant Ferro Invest II, Inc. ("Ferro Invest"), and two limited partners, neither of which is a party to this action.

We take the following facts alleged by Midland to be true for purposes of the instant motion. Midland imports and exports ferroalloys including silicon metal and ferrosilicon and sells these products to purchasers in the United States. Among the products sold by Midland is silicon metal imported from China. Defendants are domestic producers, importer/exporters, marketers and distributors of ferroalloys including silicon metal and ferrosilicon, and direct competitors of Midland.

Sometime prior to 1991, Defendants and six additional petitioners instituted with the International Trade Administration

of the U.S. Department of Commerce ("ITA") and the International Trade Commission ("ITC") a proceeding under the Tariff Act of 1930, 19 U.S.C. § 1671 et seq. (1990), commonly known as an "Anti-Dumping Proceeding." Defendants and their co-petitioners charged that the sale of silicon metal imported from China at less than fair market value was causing a "material injury" to the domestic silicon metal industry. After investigating the claims, the ITC agreed and imposed duties and tariffs on silicon metal imported from China in excess of one hundred (100) percent. The imposition of these duties caused Midland to suffer significant monetary losses, lost future profits, and impaired business relationships with third party purchasers and consumers.

Midland alleges in this action, however, that the duties imposed and the economic harm to Midland that ensued were the result of a conspiracy undertaken by Defendants. According to Midland, Defendants and certain other companies, which together account for essentially the entire domestic market for

ferroalloy products,[1] engaged in a price fixing scheme from 1989 to 1992 that artificially inflated the price of silicon metal. Defendants' scheme resulted in reduced demand for their products and increased market share for the Chinese imports sold by Midland and others. Defendants then instituted the Anti-Dumping Proceeding, claiming that the reduced demand for domestic silicon metal was the result of dumping of imports from China and using market data that had been distorted by their price fixing conspiracy. On the basis of the information manipulated by Defendants' anticompetitive practices, the ITC made its "material injury" determination and imposed the tariffs

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[1] Midland alleges that

> [t]he largest enterprises engaged in the sale, production, importation and exportation of ferroalloys, including silicon metals, through interstate commerce in and throughout the United States are the Defendants and their affiliated corporations . . . whether size is measured by volume of sales or corporate assets.

Compl. at Count II ¶8.

that caused, and continues to cause, Midland "irreparable and immeasurable injury and damage to [its] business and property." Compl. at ¶ 15. Had Defendants' price fixing been disclosed, according to Midland, "the ITC would likely have determined that there was no material injury caused in any way by imports" and would never have imposed the duties that have caused Midland such grievous harm. Pl.'s Mem. in Opp. to Mot. to Dismiss at 13.

In short, Midland alleges that Defendants "deliberately engaged in price fixing with the purpose of causing antidumping duties to be imposed on Plaintiff." Defs.' Reply at 4. These duties enabled Defendants to eliminate competition from Midland in the silicon metal market and consolidate their monopoly in the industry. Based on this alleged conspiracy, Midland asserts two violations of the Sherman Antitrust Act of 1890 and several causes of action under Pennsylvania, New York and West Virginia law. Defendants now move this Court to dismiss Midland's complaint pursuant to Fed. R. Civ. P. 12

for failure to state a claim and for want of subject matter jurisdiction.

DISCUSSION

1. Standard for Motion to Dismiss

In considering this Rule 12(b)(6) motion, we primarily consider the allegations contained in the complaint, although we may also take into account matters of public record, orders, items appearing in the record of the case and exhibits attached to the complaint. Pension Benefit Guar. Corp. v. White Consol. Indus., Inc., 998 F.2d 1192, 1196 (3d Cir. 1993), cert. denied, 510 U.S. 1042 (1994). We must accept as true all of the allegations in the pleadings and must give Midland the benefit of every favorable inference that can be drawn from those allegations. Schrob v. Catterson, 948 F.2d 1402, 1405 (3d Cir. 1991); Markowitz v. Northeast Lane Co., 906 F.2d 100, 103 (3d Cir. 1990). We may properly dismiss the complaint only if it appears certain that Midland cannot prove any set of facts in support of its claim which would entitle it to relief. Ransom v.

Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

2. Midland's Standing to Maintain this Action

Defendants raise numerous bases on which this suit might be dismissed, but we need only address one to grant the relief they seek. Defendants argue that Midland lacks standing to bring this action because the injury it alleges does not flow directly from the alleged price fixing. Instead, Defendants contend, "[a]ny injury suffered by [Midland] directly resulted from the ruling of and the antidumping duties imposed by the [ITC]." Defs.' Reply Br. at 5. Midland rejoins that its "loss of business expectancy is directly attributable to defendant's [sic] anticompetitive acts" because Defendants either knew or reasonably should have known that the ITC would impose antidumping duties in reliance on the market data distorted by Defendants' price fixing conspiracy. Pl.'s Resp. Br. at 15-17. Before we address these arguments, we must first articulate the applicable legal standards.

Though § 4 of the Clayton Act provides a treble damage remedy to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws," 15 U.S.C. § 15 (1990), the Supreme Court has held that "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n. 14 (1972); Merican, Inc. v. Caterpillar Tractor Co., 713 F.2d 958, 962 (3d Cir. 1983), cert. denied, 465 U.S. 1024 (1984). The Court has thus recognized the doctrine of "antitrust standing" as one important limitation on the broad language of the Clayton Act. Id. at 964-65.[2] Under this

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[2]Another judicially created limitation on § 4 is the distinct question of "antitrust injury," which a plaintiff must also allege to survive a motion to dismiss. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977); In Re Lower Lake Erie Iron Ore Antitrust Litigation, 998 F.2d 1144, 1166 (3d Cir. 1993), cert. denied, 510 U.S. 1091 (1994). As the Court held in Brunswick,

> Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that

doctrine, courts are required to make a threshold determination that the plaintiff is a "proper party to bring a private antitrust action." Associated General Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 535 n. 31 (1983); In Re Lower Lake Erie Iron Ore Antitrust Litigation, 998 F.2d 1144, 1169 (3d Cir. 1993), cert. denied, 510 U.S. 1091 (1994) ("Iron Ore"); Alberta Gas Chemicals v. E.I. DuPont de Nemours, 826 F.2d 1235, 1239 (3d Cir. 1987), cert. denied, 486 U.S. 1059 (1988). As our Court of Appeals has explained,

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> which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be 'the type of loss that the claimed violations . . . would be likely to cause.'

429 U.S. at 489 (citation omitted) (emphasis in original). Though this concept is very closely related to standing, and the antitrust injury analysis is largely subsumed within the standing analysis, our Court of Appeals has noted that "antitrust injury is more than a component to be factored in a standing analysis, it must be present in every case." In Re Lower Lake Erie Iron Ore Antitrust Litigation, 998 F.2d at 1166. We note this distinction to make clear that, while Defendants argue for dismissal on both injury and standing grounds, our decision rests on Midland's lack of standing.

"[t]hrough this concept of 'antitrust standing,' the Court has engrafted on section 4 an analysis akin to 'proximate cause' to determine whether a particular injury is too far removed from an alleged violation to warrant a section 4 remedy." Merican, Inc., 713 F.2d at 964 (internal citation omitted); see also Associated General Contractors, 459 U.S. at 535-36; Gulfstream III Associates v. Gulfstream Aerospace, 995 F.2d 425, 429-30 (3d Cir. 1993).

The Supreme Court has declined to fashion a black-letter rule for determining standing in every case, holding instead that "the infinite variety of claims" must be analyzed on a case-by-case basis in light of several factors. Associated General Contractors, 459 U.S. at 536-38; see also Blue Shield of Virginia v. McCready, 457 U.S. 465, 476-478 (1982). The Third Circuit has summarized the factors to be considered "in determining if the plaintiff has suffered an injury which bears a causal relation to an alleged antitrust violation," Iron Ore, 998 F.2d at 1165, as follows:

> (1) the causal connection between the antitrust violation and the harm to the plaintiff (including whether the defendant intended to cause that harm); (2) whether the 'nature' of the plaintiff's alleged injury is 'of the type that the antitrust laws were intended to forestall,'; (3) the directness or indirectness of the asserted injury; (4) the existence of more direct victims of the alleged injury (i.e. whether the plaintiff is the party most likely to seek redress of the antitrust violation); and (5) the potential for duplicative recovery or complex apportionment of damages.

McCarthy v. Recordex Service, Inc., 80 F.3d 842, 850 (3d Cir.), cert. denied, 117 S.Ct. 86 (1996) (internal citations to Associated General Contractors omitted). These factors must be "weighed and balanced," and though the Court has assigned no specific weight to the factors, "individually, collectively or relatively," the Third Circuit has described the directness factor as "all-important." Iron Ore, 998 F.2d at 1166-68.

The balance of factors here leads us to conclude that Midland lacks the requisite standing to maintain this action. First, the causation and directness factors, which we will analyze together as the Third Circuit did in Iron Ore, 998 F.2d at 1166-68, cut heavily against Midland given the attenuated causal

connection between the anticompetitive practices alleged and the harm that ultimately befell Midland. See Mid-West Paper Products Co. v. Continental Group, 596 F.2d 573 (3d Cir. 1979) (holding that antitrust plaintiff lacked standing due, in part, to tenuous link between defendants' price fixing and plaintiff's injury). Midland suffered economic loss because the ITC imposed a tariff on silicon metal imported from China after its independent determination that this measure was necessary to prevent further material injury to the domestic market. Even though the ITC reached this conclusion allegedly in reliance on market information distorted by Defendants' conspiracy (taking all of Midland's allegations as true, as we must), the ITC's action was still the direct cause of the harm alleged here. Defendants' conspiracy, even if a significant influence on the ITC's determination, was nonetheless an indirect cause of Midland's harm. Thus, the causation and "all-important" directness factors weigh strongly against Midland's standing to

sue.[3] See Alberta Gas Chemicals, 826 F.2d at 1240 ("The statutory sanctions do not constitute a broad restitutionary scheme for injuries not closely related to the violation but caused by other effects, desirable or not, of the illegal conduct."); Seaboard Supply Co. v. Congoleum Corp., 770 F.2d 367, 372 (3d Cir. 1985).

The remaining factors do not tilt the balance in Midland's favor. The nature of the asserted injury is "of the type the antitrust laws were intended to forestall" in the general sense that Defendants' alleged conspiracy restrained "the economic freedom of [a] participan[t] in the relevant market." Associated General Contractors, 459 U.S. at 908; see Acme

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[3] While Midland repeatedly alleges that Defendants intended the harm that resulted from the imposition of duties by the ITC, "an allegation of improper motive, although it may support a plaintiff's damages claim under § 4, is not a panacea that will enable any complaint to withstand a motion to dismiss." Associated General Contractors, 459 U.S. at 537; see also Blue Shield, 457 U.S. at 479 ("The availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators.")

Markets, Inc. v. Wharton Hardware and Supply Corp., 890 F.Supp. 1230, 1236 (D.N.J. 1995) ("courts generally find that competitors and consumers are proper parties because antitrust laws are intended to protect 'the economic freedom of participants in the relevant market'") (citation omitted). Causing antidumping duties to be imposed on a competitor is not, however, the "type of loss that the claimed violations . . . would be likely to cause." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977); see also Gulfstream III Associates, 995 F.2d at 429 ("[w]hether a plaintiff is the 'proper party' involves considerations such as foreseeability and proximate cause") (emphasis added) (citation omitted). We cannot say that market distortion resulting from price fixing would likely result in the wrongful imposition of antidumping duties by the ITC given the ITC's expertise and independent decision-making process.[4] Further, the harm likely to be caused

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[4] While we agree with Defendants that the economic premise of Midland's theory -- that inflated domestic prices would make the ITC more likely to conclude

by the alleged price fixing conspiracy is inflated prices. The most direct victim of the alleged price fixing -- Associated General Contractors factor 4 -- is therefore not Midland, a competitor whose business was injured by antidumping duties imposed on the basis of distorted market information, but the purchaser who paid too much for silicon metal products as a result of the conspiracy.

While neither side points to a case presenting a similar factual context in which standing was either upheld or rejected, we find support for our decision in the rationale underlying the well-settled "indirect purchaser" rule. This rule, announced by the Supreme Court in Illinois Brick Co. v. Illinois, 431 U.S. 720, 744 (1977), bars "downstream indirect purchasers from bringing an antitrust claim" against an alleged monopolist. McCarthy, 80 F.3d at 848. Our Court of Appeals recently explained the

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that the imported products were causing material injury to the domestic market -- is not unassailable, we are required here to give Midland the benefit of every favorable inference that can be drawn from its allegations. We therefore accept this premise as valid for purposes of deciding this motion.

rationale for the rule as follows:

> Recognizing that allowing an indirect purchaser to assert an antitrust claim for the portion of an overcharge 'passed on' to the indirect purchaser would create an intractable problem of tracing and apportioning damages between different purchasers in the chain of distribution, the Court chose to avoid this morass by enunciating a bright-line rule that only the purchaser immediately downstream from the alleged monopolist may bring an antitrust action.

Id. (citation omitted); see also Kansas v. Utilicorps United, Inc., 497 U.S. 199 (1990) (refusing to make exception where full cost of product, hence one hundred percent of any overcharge, was passed on to indirect purchaser).

The policy behind the indirect purchaser rule informs our judgment in this case because here, too, an apportionment morass would result from permitting recovery on an indirect theory of causation. Midland alleges that Defendants were among nine petitioners who initiated the Anti-Dumping Proceeding that resulted in the imposition of the duties at issue here. Defendants can be said to have "caused" the ITC's determination only to the extent that their alleged price fixing

and the information they supplied actually influenced the ITC's decision. The statute, 19 U.S.C. § 1671 et seq., and federal regulations, 19 C.F.R. § 201 et seq., that define the standards and procedures employed in the Anti-Dumping Proceeding make clear, however, that the ITC considers numerous factors in deciding whether or not to impose an anti-dumping duty in a given situation and in what amount.[5] Some of these factors, such as the "estimate of foreign market value" of the goods in question, see 19 C.F.R. § 353.42(a), have nothing to do with the alleged price fixing conspiracy or any market distortion that would result. Thus, determining the degree to which the ITC actually relied on information unrelated to the alleged conspiracy would inevitably be a highly speculative inquiry, impossible to resolve with any degree of certainty. See Associated General Contractors, 459 U.S. at 543 ("it is appropriate for § 4 purposes 'to consider whether a claim rests

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[5] As we note supra, we may consider these matters of public record in deciding this motion to dismiss. Pension Benefit Guar. Corp., 998 F.2d at 1196.

at bottom on some abstract conception or speculative measure of harm'") (citation omitted); Motor Carriers Labor Adv. Coun. v. Trucking Mgt., 711 F.Supp. 216, 230 (E.D.Pa. 1989) (holding that one class of plaintiffs lacked standing where damage theory was "speculative, abstract, and impractical"). Thus, the fifth and final Associated General Contractors factor -- the potential for duplicative recovery or complex apportionment of damages -- also militates strongly in favor of dismissal.

We therefore hold, based on the balance of factors in this case, that Midland lacks the requisite antitrust standing to maintain this action. We need not reach Defendants' remaining contentions to conclude that Midland's antitrust claims must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).[6] Because

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[6] We note in passing that, were outright dismissal of this action not warranted, the doctrine of primary jurisdiction would have barred our adjudication of Midland's antitrust claims at this point. This doctrine

> requires a court to suspend its process and refer a matter to an administrative body

Midland and Elkem Holding are non-diverse parties, we dismiss the pendent state law claims for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). An appropriate Order follows.

> 'whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of [that] administrative body.'

F.P. Corp. v. Ken Way Transportation, Inc., 848 F.Supp. 1181, 1185 (E.D.Pa 1994) (quoting United States v. Western Pacific, 352 U.S. 59, 64-64 (1956)). We agree with Defendants that, in accordance with the persuasive reasoning of the courts in Alberta Gas Chemicals, Ltd. v. Celanese Corp., 650 F.2d 9 (2d Cir. 1981), and Outboard Marine Corp. v. Pezetel, 535 F.Supp. 248 (D.Del. 1982), a stay of these proceedings to allow the ITC to consider Midland's claims first would have been appropriate. Midland remains free to pursue the administrative remedies available.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MIDLAND EXPORT, LTD.,	:	CIVIL ACTION
	:	
Plaintiff,	:	NO. 96-4056
	:	
VS.	:	
	:	
ELKEM HOLDING, INC., FERRO INVEST II, INC., and ELKEM METALS COMPANY, L.P.,	:	FILED NOV 18, 1996
	:	
Defendants.	:	

ORDER

AND NOW, this 18th day of November, 1996, upon consideration of Defendants' Motion to Dismiss the Complaint Pursuant to Rules 12(b)(1) and 12 (b)(6), Plaintiff's Response, and Defendants' Reply thereto, it is hereby ORDERED that the Motion is GRANTED and the Complaint is DISMISSED in its entirety.

BY THE COURT:

/s/
J. CURTIS JOYNER, J.

ENTERED: 11-19-96

CLERK OF THE COURT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 96-2135

MIDLAND EXPORT, LTD.
APPELLANT

v.

ELKEM HOLDING, INC.; FERRO INVEST II, INC.;
ELKEM METALS COMPANY, L.P.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Civ. No. 96-cv-04506
(District Judge: Honorable J. Curtis Joyner)

Argued: July 24, 1997

Before: BECKER, MANSMANN, Circuit Judges, and
HOEVELER, District Judge.

JUDGMENT ORDER

After considering the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the order of the district court of November 19, 1996 be and is hereby AFFIRMED.

Costs taxed against appellant.

BY THE COURT:

/s/
Circuit Judge

Honorable William M. Hoeveler, United States District Judge for the Southern District of Florida, acting by designation.

Attest:

/s/
P. Douglas Sisk, Clerk

OCT 15, 1997

JURISDICTIONAL STATUTES

This action was brought in two courts in the United States District Court for the Eastern District of Pennsylvania. Jurisdiction over the Second Circuit is based upon 28 U.S.C. §1331 which states:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

The federal questions arise under 15 U.S.C. §§15 and 26 (the Clayton Act) and 15 U.S.C. §§ 1 and 2 (the Sherman Act). The text of these statutes is set forth below.

15 U.S.C. §15 states:

> **(a) Amount of recovery; prejudgment interest.** Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only ---
>
> (1) whether such person or the opposing

party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(b) Amount of damages payable to foreign states and instrumentalities of foreign states.

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney's fee.

(2) Paragraph (1) shall not apply to a foreign state if --

(A) such foreign state would be denied, under section 1605(a)(2) of title 28 of the United States Code, immunity in a case in which the action is based upon a commercial activity or an act, that is the subject matter of its claim under this section;

(B) such foreign state waives all defenses based upon or arising out of its status as a foreign state, to any claims brought against it in the same action;

(C) such foreign state engages primarily in commercial activities; and

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) Definitions. For purposes of this section --

(1) the term "commercial activity" shall have the meaning given it in section 1603(d) of title 28, United States Code and

(2) the term "foreign state" shall have the meaning given it in section 1603(a) of title 28, United States Code.

15 U.S.C. §26 states:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections two, three, seven and eight of this Act when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue; Provided, That nothing herein, contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

15 U.S.C. §1 states:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to

be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. §2 states:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars of a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

The first count alleges tortious interference with business expectancies. Jurisdiction over the first count is based on 28 U.S.C. §1367(a) which states:

Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statues, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.